

LEGISLATIVE RESEARCH COMMISSION

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**REPORT TO THE
1983 GENERAL ASSEMBLY
OF NORTH CAROLINA
1984 SESSION**

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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
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June 7, 1984

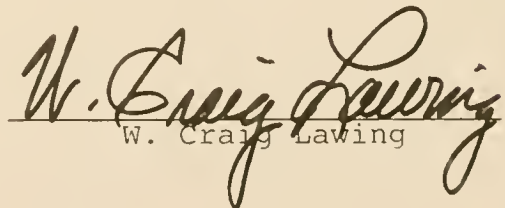
TO THE MEMBERS OF THE 1983 GENERAL ASSEMBLY (1984 SESSION):

The Legislative Research Commission herewith reports to the 1983 General Assembly (1984 Session) on the matter of confidentiality of legislative communications. The report is made pursuant to Chapter 905 of the 1983 General Assembly (1983 Session).

This report was prepared by the Legislative Research Commission's Committee on Confidentiality of Legislative Communications and is transmitted by the Legislative Research Commission for your consideration.

Respectfully submitted,


Liston B. Ramsey


W. Craig Lawing

Cochairmen

Legislative Research Commission

LEGISLATIVE RESEARCH COMMISSION

Senator W. Craig Lawing, Cochairman
Senator William N. Martin
Senator Helen R. Marvin
Senator William W. Staton
Senator Joseph E. Thomas
Senator Russell Walker

Representative Liston B. Ramsey, Cochairman
Representative Christopher S. Barker, Jr..
Representative John T. Church
Representative Bruce Ethridge
Representative John J. Hunt
Representative Margaret Tennille

PREFACE

The Legislative Research Commission, authorized by Article 6B of Chapter 120 of the General Statutes, is a general purpose study group. The Commission is co-chaired by the Speaker of the House and the President Pro Tempore of the Senate and has five additional members appointed from each house of the General Assembly. Among the Commission's duties is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" [G.S. 120-30.17(1)].

At the direction of the 1983 General Assembly, the Legislative Research Commission has undertaken studies of numerous subjects. These studies were grouped into broad categories and each member of the Commission was given responsibility for one category of study. The co-chairmen of the Legislative Research Commission, under the authority of General Statute 120-30.10(b) and (c), appointed committees consisting of members of the General Assembly and the public to conduct the studies. Co-chairmen, one from each house of the General Assembly, were designated for each committee.

The study of confidentiality of legislative communications was authorized by Section 1(26) of Chapter 905 of the 1983 Session Laws (1983 Session). That act states that the Commission may consider House Resolution 1461 in determining the nature, scope and aspects of the study. Section 1 of House Resolution 1461 reads:

"The Legislative Research Commission may study the issue of confidentiality of legislative communications and whether the scope of confidentiality should be expanded to include requests made by legislators to all State employees, State officers, and retained consultants and counsel to any State agency."

The Legislative Research Commission grouped this study in its Government area under the direction of Senator Helen R. Marvin. The study committee was chaired by Senator William W. Staton and Representative Narvel J. Crawford, Jr. The full membership of the committee is listed in Appendix A of this report. Relevant portions of Chapter 905 and House Resolution 1461 are included in Appendices B and C, respectively.

COMMITTEE PROCEEDINGS

The Legislative Research Commission's Committee on Confidentiality of Legislative Communications (hereafter "the Committee") met twice.

At its first meeting on December 1, 1983 the Committee reviewed Chapter 900 of the 1983 Session Laws (1983 Session), entitled AN ACT TO PROVIDE CONFIDENTIALITY IN LEGISLATIVE COMMUNICATIONS (hereafter "Act"), codified as Article 17 of Chapter 120 of the North Carolina General Statutes (see Appendix D). That Act was effective on July 21, 1983. The staff distributed a section-by-section analysis of that Article. The staff indicated that the policy of confidentiality of legislative communications is based on the premise that legislators have a right to speculate and be protected from harassment and premature publication. North Carolina, unlike some other states and the United States, does not have a Speech and Debate Clause in its Constitution. G.S. 120-9, a 1787 statute, grants speech and debate protections to legislators (see Appendix D).

The staff indicated that although the Legislative Services Office has traditionally had a policy of strict confidentiality on legislative requests, the definition of "public records" in Chapter 132 of the General Statutes is so broad as to be inclusive of the work the legislative staff performs at legislators' requests prior to the legislators' making the work product public and to require its disclosure upon request. Chapter 132 is attached as Appendix E.

A committee member, Representative George W. Miller, Jr., who

sponsored both Chapter 900, and House Resolution 1461 calling for this study, explained that the Resolution called for a study of the issues of confidentiality in legislative communications and whether the scope of Chapter 900 should be expanded to make confidential requests made by legislators to all State employees, officials and retained consultants. He stated that one of the prime purposes of the Act was to set forth a clear statement of policy in law to inform and protect legislative employees. Representative Miller emphasized that the penalty provision, G.S. 120-134, contained in the Act was disciplinary and not criminal in nature.

Mr. John L. Sanders, Director of the Institute of Government, indicated that under Chapter 900, unlike other state government employees, Institute of Government personnel are legislative employees and are bound by the confidentiality requirements. Mr. Sanders said that in that executive branch state employees ultimately report to the Governor he did not know any way that their reporting legislative requests for information could be cut off effectively, or if this was desirable. Mr. Sanders stated that Chapter 900 took records made upon request of legislators out of the definition of "public records" contained in Chapter 132 of the General Statutes. He said that since its enactment in 1935, the public records law had been read much more broadly than originally intended. He suggested that that law might require examination.

The Committee instructed its staff to send out a survey to all State legislators and all legislative staff asking, among other matters, whether the individuals had encountered any difficulties because of the Act, the individuals to specify the difficulties

encountered, whether the Act should be amended and, if so, in what way. The survey and a memorandum explaining the results of that survey are attached as Appendix F.

Of the 86 legislators responding, or just over half of the legislators, only three had difficulty with the Act. On the question of whether or not the Act should be amended, of the legislators who responded, 49 legislators (57%) answered negatively and 18 (20.9%) answered affirmatively, while 19 legislators (22.1%) did not respond.

Of the 18 legislators who believed that the Act should be amended, eight (9.5%) believed that the application of the Act should be expanded to encompass executive branch employees, other State employees and others; five (5.9%) believed the Act should be restricted but did not specify the restriction; two (2.4%) specified that the Act should be repealed; and three (3.6%) suggested various other changes.

Forty-four legislative employees responded to the survey, only two indicating they had encountered difficulties as a result of the Act. Of those employees who responded, 26 (59.1%) believed the Act should not be amended. Eleven of the 44 respondents (25%) said the Act should be amended. Two of these (4.5%) believed the Act should be expanded to include other State employees and nine of the 11 (20.5%) thought the Act ought to be otherwise amended.

FINDINGS AND RECOMMENDATIONS

After a careful review of the information presented to it, the Committee found that:

1. No substantive revisions should be made at this time to the Act to Provide Confidentiality in Legislative Communications. The Committee agrees with those respondents to the survey who pointed out that the Act has only been in effect since July of last year and there is not a sufficient basis of experience under the new Act to evaluate the need for major changes to the Act.

2. The Committee has, however, learned of technical, non-substantive areas that can and should be made to the Act to clarify the original intent of the legislature in passing that legislation. The areas needing clarification, in the Committee's opinion, include the Act's application to consultants and counsel to legislative commissions; the making public of documents before those commissions; and the expansion of the present definition of legislator to include members-elect.

RECOMMENDATION: The Committee recommends that the General Assembly enact legislation to clarify and make technical amendments to the Act to Provide Confidentiality in Legislative Communications. The proposed legislation is attached as Appendix G and is followed by an analysis in Appendix H.

3. Bill drafts are being prepared by legislative staff without the names of the legislators requesting them. The Committee is inclined to believe that bill drafts should be so identified.

RECOMMENDATION: The Committee recommends that the Legislative Services Commission investigate the advisability of requiring all bill drafts

prepared by employees of the Legislative Services Office to contain the name of the legislator requesting the bill and, if deemed advisable, to adopt a rule requiring all bill drafts to be so identified.

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H. B. 1142

CHAPTER 965

AN ACT AUTHORIZING STUDIES BY THE LEGISLATIVE RESEARCH COMMISSION AND BY THE COMMISSION ON CHILDREN WITH SPECIAL NEEDS AND MAKING TECHNICAL AMENDMENTS RELATING THERETO.

The General Assembly of North Carolina enacts:

Section 1. The Legislative Research Commission may study the topics listed below. Listed with each topic is the 1983 bill or resolution that originally proposed the study and the name of the sponsor. The Commission may consider the original bill or resolution in determining the nature, scope and aspects of the study. The topics are:

(26) Legislative Communications Confidentiality (H.R. 1461 - Miller).

Sec. 6. For each of the topics the Legislative Research Commission decides to study, the Commission may report its findings, together with any recommended legislation, to the 1984 Session of the General Assembly or to the 1985 General Assembly, or the Commission may make an interim report to the 1984 Session and a final report to the 1985 General Assembly.

Sec. 13. Bills and Resolution References. The listing of the original bill or resolution in this act is for references purposes only and shall not be deemed to have incorporated by reference any of the substantive provisions contained in the original bill or resolution.

Sec. 14. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 21st day of July, 1983.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1983

HOUSE RESOLUTION 1461

Sponsors: Representative Miller.

Referred to: Appropriations.

July 14, 1983

1 A HOUSE RESOLUTION AUTHORIZING THE LEGISLATIVE RESEARCH
2 COMMISSION TO STUDY CONFIDENTIALITY OF LEGISLATIVE
3 COMMUNICATIONS.

4 Be it resolved by the House of Representatives:

5 Section 1. The Legislative Research Commission may
6 study the issue of confidentiality of legislative communications
7 and whether the scope of confidentiality should be expanded to
8 include requests made by legislators to all State employees,
9 State officers, and retained consultants and counsel to any State
10 agency.

11 Sec. 2. The Commission may report its findings,
12 together with any recommended legislation to the 1984 Session of
13 the General Assembly or to the 1985 General Assembly.

14 Sec. 3. This resolution is effective upon adoption.
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GENERAL STATUTES OF NORTH CAROLINA

Chapter 120.
General Assembly.

ARTICLE 2.

*Duty and Privilege of Members.***§ 120-9. Freedom of speech; protection from arrest.**

The members shall have freedom of speech and debate in the General Assembly, and shall not be liable to impeachment or question, in any court or place out of the General Assembly, for words therein spoken; and shall be protected, except in cases of crime, from all arrest and imprisonment, or attachment of property, during the time of their going to, coming from, or attending the General Assembly. (1787, c. 277, s. 3; P. R.; R. C., c. 52, s. 29; Code, s. 2849; Rev., s. 4404; C. S., 6093.)

ARTICLE 17.

*Confidentiality of Legislative Communications.***§ 120-129. Definitions.**

As used in this Article:

- (1) "Document" means all records, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material regardless of physical form or characteristics.
- (2) "Legislative employee" means employees and officers of the General Assembly, consultants and counsel to members and committees of either house of the General Assembly who are paid by State funds, and employees of the Institute of Government; but does not mean legislators and members of the Council of State.
- (3) "Legislator" means a duly elected or appointed member of the North Carolina Senate or House of Representatives. (1983, c. 900, s. 1.)

Editor's Note. — Session Laws 1983, c. 900, s. 2, makes this Article effective upon ratification. The act was ratified July 21, 1983.

§ 120-130. Drafting and information requests to legislative employees.

(a) A drafting request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator.

(b) An information request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator. Notwithstanding the preceding sentences of this subsection, the periodic publication by the Fiscal Research Division of the Legislative Services Office of a list of information requests is not prohibited, if the identity of the legislator making the request is not revealed.

(c) Any supporting documents submitted or caused to be submitted to a legislative employee by a legislator in connection with a drafting or information request are confidential. Except to the extent necessary to answer the request, neither the document nor copies of it, nor the identity of the person, firm, or association producing it, may be provided to any person who is not a legislative employee without the consent of the legislator.

(d) Drafting or information requests or supporting documents are not "public records" as defined by G.S. 132-1. (1983, c. 900, s. 1.)

§ 120-131. Documents produced by legislative employees.

(a) Documents prepared by legislative employees upon the request of legislators are confidential. Except as provided in subsection (b) of this section, the existence of the document may not be revealed nor may a copy of the document be provided to any person who is not a legislative employee without the consent of the legislator.

(b) A document prepared by a legislative employee upon the request of a legislator becomes available to the public when the document is a:

- (1) Bill or resolution and it has been introduced;
- (2) Proposed amendment or committee substitute for a bill or resolution and it has been offered at a committee meeting or on the floor of a house;
- (3) Proposed conference committee report and it has been offered at a joint meeting of the conference committees; or
- (4) Bill, resolution, memorandum, written analysis, letter, or other document resulting from a drafting or information request and it has been distributed at a study commission, or study or standing committee or subcommittee meeting not held in executive session or on the floor of a house.

A document prepared by a legislative employee upon the request of any legislator, that pursuant to this Article does not become available to the public, is not a "public record," as defined by G.S. 132-1.

(c) This section does not prohibit the dissemination of information or language contained in any document which has been prepared by a legislative employee in response to a substantially similar request from another legislator, provided that the identity of the requesting legislator and the fact that he had made such a request not be divulged. (1983, c. 900, s. 1.)

§ 120-132. Testimony by legislative employees.

No present or former legislative employees may be required to disclose any information that the individual, while employed or retained by the State, may have acquired:

- (1) In a standing, select, or conference committee or subcommittee of either house of the General Assembly;
- (2) On the floor of either house of the General Assembly, or in any office of a legislator;
- (3) As a result of communications that are confidential under G.S. 120-130 and G.S. 120-131.

Notwithstanding the provisions of the preceding sentence, the presiding judge of a court of competent jurisdiction may compel that disclosure, if in his opinion, the same is necessary to a proper administration of justice. (1983, c. 900, s. 1.)

§ 120-133. Redistricting communications.

Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the ratification of the act establishing the relevant district plan. Present and former legislative employees may be required to disclose information otherwise protected by G.S. 120-132 concerning redistricting the North Carolina General Assembly or the Congressional Districts upon the ratification of the act establishing the relevant district plan. (1983, c. 900, s. 1.)

§ 120-134. Penalty.

Violation of any provision of this section [Article] shall be grounds for disciplinary action in the case of employees and for removal from office in the case of public officers. No criminal penalty shall attach for any violation of this Article. (1983, c. 900, s. 1.)

CH 132. PUBLIC RECORDS

Chapter 132.

Public Records.

§ 132-1. "Public records" defined.

"Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government. (1935, c. 265, s. 1; 1975, c. 787, s. 1.)

§ 132-1.1. Confidential communications by legal counsel to public board or agency; not public records.

Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body. (1975, c. 662.)

§ 132-2. Custodian designated.

The public official in charge of an office having public records shall be the custodian thereof. (1935, c. 265, s. 2.)

§ 132-3. Destruction of records regulated.

No public official may destroy, sell, loan, or otherwise dispose of any public record, except in accordance with G.S. 121-5, without the consent of the Department of Cultural Resources. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500.00). (1935, c. 265, s. 3; 1943, c. 237; 1953, c. 675, s. 17; 1957, c. 330, s. 2; 1973, c. 476, s. 48.)

§ 132-4. Disposition of records at end of official's term.

Whoever has the custody of any public records shall, at the expiration of his term of office, deliver to his successor, or, if there be none, to the Department of Cultural Resources, all records, books, writings, letters and documents kept or received by him in the transaction of his official business; and any such person who shall refuse or neglect for the space of 10 days after request made in writing by any citizen of the State to deliver as herein required such public records to the person authorized to receive them shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars (\$1,000) or both. (1935, c. 265, s. 4; 1943, c. 237; 1973, c. 476, s. 48; 1975, c. 696, s. 1.)

§ 132-5. Demanding custody.

Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall forthwith deliver the same to him. If the person who unlawfully possesses public records shall without just cause refuse or neglect for 10 days after a request made in writing by any citizen of the State to deliver such records to their lawful custodian, he shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars (\$1,000) or both. (1935, c. 265, s. 5; 1975, c. 696, s. 2.)

§ 132-5.1. Regaining custody; civil remedies.

(a) The Secretary of the Department of Cultural Resources or his designated representative or any public official who is the custodian of public records which are in the possession of a person or agency not authorized by the custodian or by law to possess such public records may petition the superior court in the county in which the person holding such records resides or in which the materials in issue, or any part thereof, are located for the return of such public records. The court may order such public records to be delivered to the petitioner upon finding that the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records. If the order of delivery does not receive compliance, the petitioner may request that the court enforce such order through its contempt power and procedures.

(b) At any time after the filing of the petition set out in subsection (a) or contemporaneous with such filing, the public official seeking the return of the public records may by ex parte petition request the judge or the court in which the action was filed to grant one of the following provisional remedies:

- (1) An order directed at the sheriff commanding him to seize the materials which are the subject of the action and deliver the same to the court under the circumstances hereinafter set forth; or
- (2) A preliminary injunction preventing the sale, removal, disposal or destruction of or damage to such public records pending a final judgment by the court.

(c) The judge or court aforesaid shall issue an order of seizure or grant a preliminary injunction upon receipt of an affidavit from the petitioner which alleges that the materials at issue are public records and that unless one of said provisional remedies is granted, there is a danger that such materials shall be sold, secreted, removed out of the State or otherwise disposed of so as not to be forthcoming to answer the final judgment of the court respecting the same; or that such property may be destroyed or materially damaged or injured if not seized or if injunctive relief is not granted.

(d) The aforementioned order of seizure or preliminary injunction shall issue without notice to the respondent and without the posting of any bond or other security by the petitioner. (1975, c. 787, s. 2.)

§ 132-6. Inspection and examination of records.

Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law. (1935, c. 265, s. 6.)

§ 132-7. Keeping records in safe places; copying or repairing; certified copies.

Insofar as possible, custodians of public records shall keep them in fireproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used. Record books should be copied or repaired, renovated or rebound if worn, mutilated, damaged or difficult to read. Whenever any State, county, or municipal records are in need of repair, restoration, or rebinding, the head of such State agency, department, board, or commission, the board of county commissioners of such county, or the governing body of such municipality may authorize that the records in need of repair, restoration, or rebinding be removed from the building or office in which such records are ordinarily kept, for the length of time required to repair, restore, or rebind them. Any public official who causes a record book to be copied shall attest it and shall certify on oath that it is an accurate copy of the original book. The copy shall then have the force of the original. (1935, c. 265, s. 7; 1951, c. 294.)

§ 132-8. Assistance by and to Department of Cultural Resources.

The Department of Cultural Resources shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, filing and making available the public records in their custody. When requested by the Department of Cultural Resources, public officials shall assist the Department in the preparation of an inclusive inventory of records in their custody, to which shall be attached a schedule, approved by the head of the governmental unit or agency having custody of the records and the Secretary of Cultural Resources, establishing a time period for the retention or disposal of each series of records. Upon the completion of the inventory and schedule, the Department of Cultural Resources shall (subject to the availability of necessary space, staff, and other facilities for such purposes) make available space in its Records Center for the filing of semicurrent records so scheduled and in its archives for noncurrent records of permanent value, and shall render such other assistance as needed, including the microfilming of records so scheduled (1935, c. 265, s. 8; 1943, c. 237; 1959, c. 68, s. 2; 1973, c. 476, s. 48.)

§ 132-8.1. Records management program administered by Department of Cultural Resources; establishment of standards, procedures, etc.; surveys.

A records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of official records shall be administered by the Department of Cultural Resources. It shall be the duty of that Department, in cooperation with and with the approval of the Department of Administration, to establish standards, procedures, and techniques for effective management of public records, to make continuing surveys of paper work operations, and to recommend improvements in current records management practices including the use of space, equipment, and supplies employed in creating, maintaining, and servicing records. It shall be the duty of the head of each State agency and the governing body of each county, municipality and other subdivision of government to cooperate with the Department of Cultural Resources in conducting surveys and to establish and maintain an active, continuing program for the economical and efficient management of the records of said agency, county, municipality, or other subdivision of government. (1961, c. 1041; 1973, c. 476, s. 48.)

§ 132-8.2. Selection and preservation of records considered essential; making or designation of preservation duplicates; force and effect of duplicates or copies thereof.

In cooperation with the head of each State agency and the governing body of each county, municipality, and other subdivision of government, the Department of Cultural Resources shall establish and maintain a program for the selection and preservation of public records considered essential to the operation of government and to the protection of the rights and interests of persons, and, within the limitations of funds available for the purpose, shall make or cause to be made preservation duplicates or designate as preservation duplicates existing copies of such essential public records. Preservation duplicates shall be durable, accurate, complete and clear, and such duplicates made by a photographic, photostatic, microfilm, micro card, miniature photographic, or other process which accurately reproduces and forms a durable medium for so reproducing the original shall have the same force and effect for all purposes as the original record whether the original record is in existence or not. A transcript, exemplification, or certified copy of such preservation duplicate shall be deemed for all purposes to be a transcript, exemplification, or certified copy of the original record. Such preservation duplicates shall be preserved in the place and manner of safekeeping prescribed by the Department of Cultural Resources. (1961, c. 1041; 1973, c. 476, s. 48.)

§ 132-9. Access to records.

Any person who is denied access to public records for purposes of inspection, examination or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders. (1935, c. 265, s. 9, 1975, c. 787, s. 3.)

STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611



TO: Members of the Legislative Research Commission's (LRC)
Committee on Confidentiality in Legislative Communications

FROM: Terrence D. Sullivan, Director of Research

RE: Results of Survey on Confidentiality of Legislative Commu-
nications

INTRODUCTION

On December 2, 1983, the LRC's Committee on Confidentiality in Legislative Communications sent a survey to all State legislators and the staffs of the Legislative Services Office, the House and Senate Principal Clerks' Offices and the Institute of Government. The survey concerned Chapter 900 of the 1983 Session Laws (1983 Regular Session), AN ACT TO PROVIDE CONFIDENTIALITY IN LEGISLATIVE COMMUNICATIONS, its effect and possible modification. Respondents were asked not to reveal their identities. A copy of the survey form and covering memorandum is attached. The Committee requested that responses be made by December 15, 1983.

Summaries for both legislators' and legislative staffs' responses follow. I have quantified the responses. Where a percentage (in parentheses) follows a number of legislators or of legislative staff members, the percentage indicates the portion that number bears to the total of all legislators or of all legislative staff responding rounded to the nearest one-tenth of a percent. I have not made any changes to the direct quotes in the comments.

SUMMARY FOR LEGISLATORS' RESPONSES

By January 16, 1984, eighty-six legislators (slightly more than one-half of all legislators) had responded to the survey.

Of 86 legislators responding, only three had difficulties with the Act to Provide Confidentiality in Legislative Communications ("the Act"). On the question of whether or not the Act should be amended, 49 legislators (57%) answered negatively and 18 (20.9%) answered affirmatively, while 19 legislators (22.1%) did not respond.

Of the eighteen legislators who believed that the Act should be amended, eight (9.5%) believed that the application of the Act should

be expanded to encompass executive branch employees, other State employees and others; five (5.9%) believed the Act should be restricted but did not specify the restriction; and two (2.4%) specified that the Act should be repealed. Each of the following positions were taken by one legislator each (1.2%), the Act should be amended (1) in some other way; (2) to require the legislator to put in writing his request for confidentiality; and (3) to be more restrictive, more expansive, and in some other unspecified way.

One of the eight legislators who stated that the application of the Act should be expanded also stated that the present Act's penalty provision should include a fine of one year's salary for those violating the Act.

SELECTED LEGISLATOR COMMENTS

Regarding problems with the present Act:

1. "Staff, fiscal and other employees have divulged information before it was supposed to be made public."
2. "I introduced a bill which I was told had no fiscal impact. Another legislator disagreed and contacted Fiscal Research. Fiscal Research (one member) proceeded to give the other legislator different information than was given me by Fiscal Research. The other legislator then killed my bill (temporarily) with this "surprise" information from Fiscal REsearch. When I contacted the staffer with Fiscal Research, I was informed that I had no right to be notified in such a case in advance--even though the information was in conflict and withheld from me. This is a difficult problem, and I'm not sure if this law speaks to this issue or not. Maybe it is just a question of courtesy and ethics."

Generally:

1. No confidentiality problem before or after Act
2. May be too restrictive in present form
3. "Must not 'box in' our staff too much. 'Bull legislators' now trying to do so."
4. "No problem with present Act. Before Act, Legislator A gave Bill Drafting Division personnel a bill to be put in proper form for introduction. Legislator B asked for a bill draft on the same subject. Staff gave Legislator B Legislator A's bill and Legislator B then introduced the bill "word for word".

5. Confidentiality Act clutters statutes. The policy could be better handled by rules of the Legislative Services Commission.
6. "Possibly be applicable to communications between 'elected' executive branch officials and executive branch employees."

SUMMARY FOR LEGISLATIVE STAFFS' RESPONSES

By January 16, 1984, forty-four members of the legislative staff responded to the survey. Only two of those responding stated that they had encountered difficulties with the Act. The difficulties encounter under the Act related to communication problems with employees in the executive branch, and determining whether a request by a legislator "in his capacity as [a] local official" was confidential.

Twenty-six staff members (59.1%) indicated they believed the Act should not be amended. They cited as reasons for not amending the Act that: there was not enough experience under the Act to justify considering amendments at this time; extension of confidentiality beyond the legislative staff is unwieldy and impracticable and would seriously undermine the ability of agency heads to lead; and the free flow of information is critical to efficient and effective government and should be inhibited as little as possible.

Eleven of the staff (25%) believe the Act needs to be amended--two of whom (4.5%) believe the Act should be expanded to include other State employees; and nine of whom (20.5%) think the Act ought to be restricted. Among the restrictive amendments suggested were that: no communication should be presumptively confidential and that confidentiality should only be imposed upon written requests; General Statute 120-130(b) restricting revealing existence of the information request, may result in an inability to obtain as much information as possible and needs to be stricken; clarification that information developed for some other need does not become confidential when it becomes the subject of a request from a legislator; periodic publication by the General Research and Bill Drafting Divisions"of information requests having significant public interest should be treated similar to the publication of information requests prepared by Fiscal Research"; and the Act's application should be restricted to the then current session of the General Assembly.

Seven staff members (15.9%) stated no opinion as to whether the Act should be amended at this time.

SELECTED GENERAL COMMENTS BY LEGISLATIVE STAFF

1. "Legislative staff members should advise a legislator making a request that is confidential of any other obligations or assignments that may make it impossible

for the legislative staff member not to, in effect, compromise the intent of the statute in the request at hand."

2. "Some thought may be given to the identification of proposed legislation requested to be drafted or entered into the computer for the required form by someone other than an elected member of the General Assembly.

As it stands now, does this Statute cover requests for drafting of proposed legislation by NON-legislators? (County Attorneys; members of the Executive/Judicial; lobbyists; etc.)"

3. "Information in supporting documents or other information provided to legislators may be applicable to more than one bill or more than one legislator. For example, information regarding alternative tax measures may be requested by several legislators and members of the press or the public."
4. Should definition of employee in G.S. 120-129(2) include consultants and counsel to legislative commissions (e.g. Legislative Research and Services Commissions); should provision be made in G.S. 120-131 for the making public of documents before those Commissions; and should the definition of legislator in G.S. 120-129(3) include members-elect as they are not members until they take the oath in January?

STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611



December 2, 1983

MEMORANDUM

TO: Representatives
Senators
Principal Clerks
Legislative Services Office Staff
Institute of Government Staff

FROM: Senator William W. Staton
Representative Jim Crawford
Cochairmen
Committee on Confidentiality of Legislative Communications

RE: Survey

You will remember that the 1983 General Assembly passed AN ACT TO PROVIDE CONFIDENTIALITY IN LEGISLATIVE COMMUNICATION (Chapter 900 (House Bill 1240)), which as a matter of law established a privilege on communications between legislators and legislative staff, including Institute of Government personnel. We enclose a copy of the act as well as a brief summary of its provisions for your review.

The 1983 General Assembly also authorized the Legislative Research Commission to study the issue of legislative communications and whether the scope of confidentiality should be expanded to include requests made by legislators to all State employees, State officers, and retained consultants and counsel to any State agency [Section 1(26) of Chapter 905 of the 1983 Session Laws (House Bill 1142)].

The Committee which we chair is currently undertaking this study. The Committee wishes to obtain the views of legislators and others most directly concerned on this issue. We would therefore ask you to complete the attached questionnaire and to return it in the enclosed stamped envelope by December 15, 1983. Please identify yourself only as either a legislator or legislative staff.

SURVEY ON
CONFIDENTIALITY OF LEGISLATIVE COMMUNICATIONS

1. Are you a
Legislator _____ or Legislative Staff _____
(including Institute of Government employees)
2. Since July 21, 1983, the effective date of the Act to Provide
for Confidentiality in Legislative Communications, have you
encountered any difficulties because of that Act?
YES _____ NO _____
3. If you have encountered difficulties would you please outline
them. Please do not specify your identity, or the subject
matter or legislative staff involved.
4. Do you believe that the Act should be amended.
YES _____ NO _____
If so, in what way should the Act be amended
 - a. to restrict its application?
 - b. to expand its application--to executive branch
employees, to all State employees, to others?
 - c. in some other way?
5. Other comments.

SUMMARY OF

AN ACT TO PROVIDE CONFIDENTIALITY IN LEGISLATIVE COMMUNICATIONS

(Chapter 900 of the 1983 Session Laws)

Chapter 900 adds, effective July 21, 1983, a new Article 17 to Chapter 120 of the General Statutes to insure the confidentiality of Legislative Communications.

G. S. 120-129 in essence, gives to the word "document" the exhaustive definition of "public record" contained in G. S. 132-1; includes in the definition of "legislative employee" employees and officers of the General Assembly, consultants and counsel paid by State funds to members and committees of the General Assembly and the employees of the Institute of Government; and defines "legislator" as a duly-elected or appointed member of the North Carolina Senate or House of Representatives.

G. S. 120-130 makes confidential drafting and information requests by legislators to legislative employees and prohibits the revelation of the request or of the legislator's identity to anyone not a legislative employee without the legislator's consent. Similarly, any supporting documents furnished or caused to be furnished to a legislative employee by a legislator are confidential. Subsection (d) specifically states that drafting or information requests or supporting documents are not public records for purposes of Chapter 132 of the General Statutes which sets out North Carolina's public records law.

G. S. 120-131 states that documents prepared by legislative employees upon the request of legislators are confidential, are not "public records" for purposes of Chapter 132, and prohibits disclosure except to other legislative employees. Subsection (b) sets forth the instances when these documents become public.

G. S. 120-132 gives to present and former legislative employees a privilege from testifying as to any information the employee may have acquired while employed in a committee or subcommittee of the General Assembly, on the floor of either house of the General Assembly, in any legislator's office, or as a result of confidential communications. The section does permit the presiding judge of any court of competent jurisdiction to compel disclosure if that disclosure is necessary to a proper administration of justice.

G. S. 120-133 makes all drafting and information requests and documents prepared by legislative employees for legislators concerning legislative or congressional redistricting no longer confidential upon the ratification of the Act establishing the relevant district plan. Similarly these employees may be required to testify concerning the redistricting efforts upon ratification of the relevant redistricting plan.

G. S. 120-134 notes that, while violation of legislative confidentiality is grounds for disciplinary action in the case of employees and for removal from office in the case of public officers, no criminal penalty attaches to that violation.

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INTRODUCED BY:

PROPOSED LEGISLATION

DRAFT
FOR REVIEW ONLY

Referred to:

1 A BILL TO BE ENTITLED AN ACT TO CLARIFY AND MAKE TECHNICAL AMENDMENTS
2 TO ARTICLE 17 OF CHAPTER 120 OF THE GENERAL STATUTES, CONFIDENTIALITY
3 OF LEGISLATIVE COMMUNICATIONS.

4 The General Assembly of North Carolina enacts:

5 Section 1. G.S. 120-129 is amended by inserting a new
6 subdivision (1a) to read:

7 "(1a) 'Legislative Commission' means any commission or
8 committee which the Legislative Services Commission is
9 directed or authorized to staff by law or resolution
10 and which it does, in fact, staff."

11 Sec. 2. Subdivision (2) of G.S. 120-129 is amended by
12 inserting "or of legislative commissions" after the words "General
13 Assembly" and before the words "who are paid".

14 Sec. 3. G.S. 120-129(3) is amended by deleting the
15 words "duly elected or appointed" and inserting in lieu thereof
16 the words "member-elect, member-designate, or".

17 Sec. 4. G.S. 120-131(b)(4) is amended by deleting
18 the words "study commission, or study" and inserting in lieu
19 thereof the words "legislative commission".

20 Sec. 5. G.S. 120-132(1) is amended by inserting the
21 words "or a legislative commission" after the words "General
22 Assembly" and before the semicolon ";".

23 Sec. 6. The first sentence of G.S. 120-134 is amended
24 by deleting the words "section [Article]" and inserting in lieu

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¹ thereof the word "Article".

² Sec. 7. This Act is effective upon ratification.

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ANALYSIS OF
PROPOSED LEGISLATION

TITLE: A BILL TO BE ENTITLED AN ACT TO CLARIFY AND MAKE TECHNICAL AMENDMENTS TO ARTICLE 17 OF CHAPTER 120 OF THE GENERAL STATUTES, CONFIDENTIALITY OF LEGISLATIVE COMMUNICATIONS.

Section 1. Creates a new definition of "Legislative Commission" which is any commission or committee of either house which the Legislative Services Commission or its agencies is directed or authorized to staff by law or resolution and which it does, in fact, staff.

Section 2. Inserts the newly defined phrase "legislative commission" into the definition of "legislative employee" so as to clarify that the work products requested by legislators on those commissions are under the confidentiality provisions.

Section 3. Amends the definition of legislator to clarify that the confidentiality protections also apply to members-elect of the General Assembly.

Sections 4 and 5. Inserts the phrase "legislative commission" in those sections of Article 17 relating to when the documents become public and testimony concerning information obtained by legislative employees during a commission's deliberations.

Section 6. Corrects a technical error in referring to a section instead of the entire Confidentiality Article.

